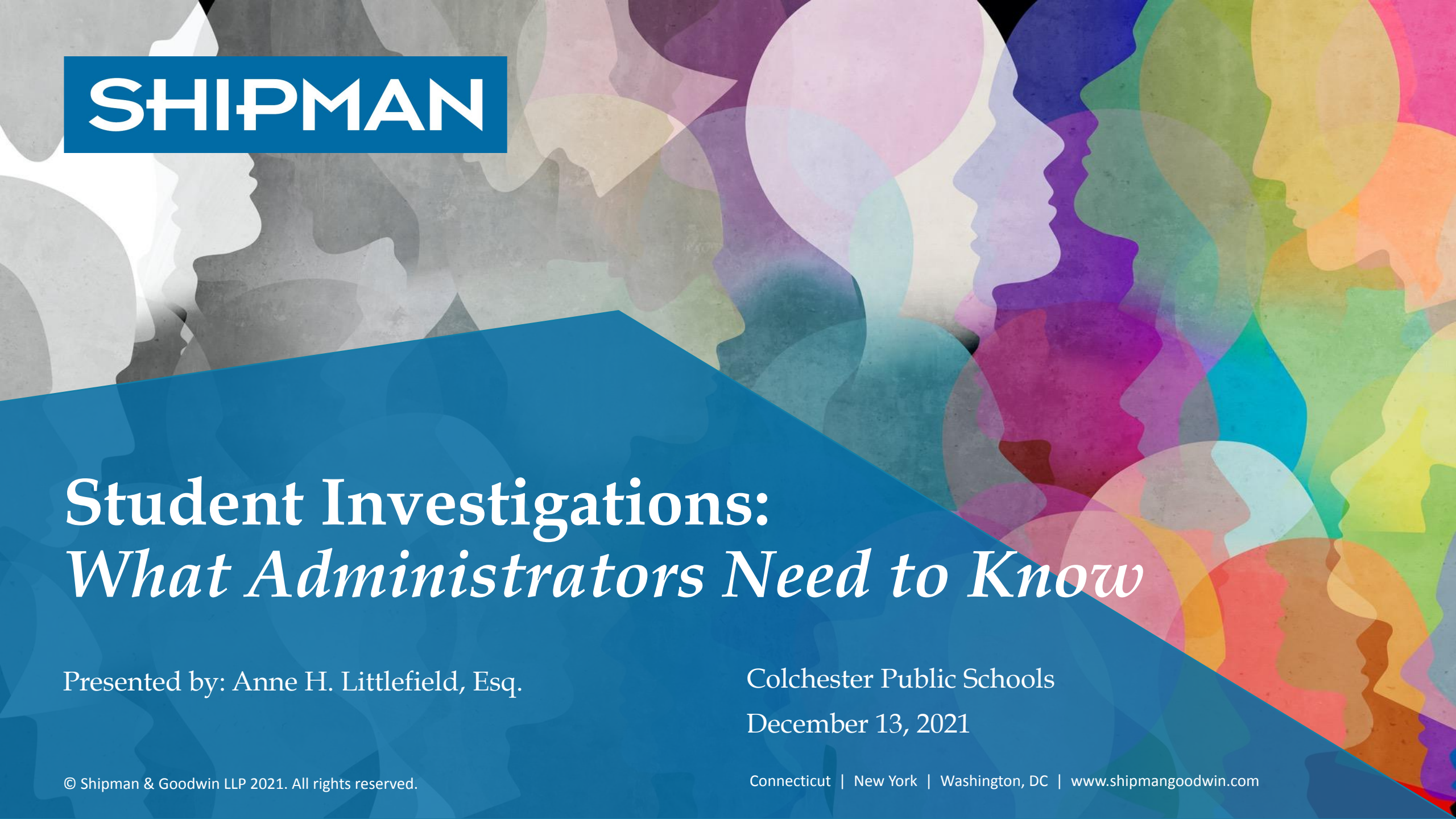

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Student Investigations:
What Administrators Need to Know

Presented by: Anne H. Littlefield, Esq.

Colchester Public Schools

December 13, 2021

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Agenda

- Investigation Challenges
- Connecticut Bullying Law
- Targeted Harassment
- Investigations

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Investigation Challenges

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Practical Concerns

- Time constraints
- Knowing (or NOT knowing) students' prior history
- Institutional knowledge (i.e. how has this been handled before?)
- Should we call the police?
- Should we call DCF?
- Diverse populations
- I'm not a trained detective!

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Practical Concerns

- Overlapping Policies
- Ever-changing legal requirements/procedural requirements
- Special education/504 issues
- Communications with parents
- Press/social media attention

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Connecticut Bullying Law

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2019 Changes to Bullying Law Effective July 1, 2021 – Public Act 19-166

- No longer a requirement that both the alleged perpetrator and alleged victim be students attending school in the same district.
- Removes requirement that the act be "repetitive"
- Establishes a new harassment-like standard, which requires that the act be "**severe, persistent, or pervasive.**"

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"Bullying" in Connecticut

- An act that is direct or indirect and severe, persistent or pervasive, which (A) causes physical or emotional harm to an individual, (B) places an individual in fear of physical or emotional harm, or (C) infringes on the rights or opportunities of an individual at school.

This new definition was part of changes to the bullying law in 2019 and became effective on July 1, 2021

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"Bullying" includes:

- A **written, oral or electronic communication** or **physical act or gesture**

- based on any **actual or perceived differentiating characteristics**, such as **race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression,** socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics.

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"Cyberbullying"

Cyberbullying is explicitly defined as "…any act of bullying using the **internet, interactive** and **digital** technologies, **cellular mobile telephone** or other **mobile electronic devices**, or any **electronic communications**."

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Bullying MUST

be investigated when it occurs…

- On school grounds
- At a school-sponsored or school-related activity, whether on or off school grounds
- At a school bus stop or on a school bus or other vehicle owned, leased or used by district
- Through the use of an electronic device or mobile device owned, leased or used by local or regional Board of Education, AND

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AND Bullying MUST

be investigated when it occurs…

- **Outside of the school setting if** any of such bullying fulfills any of the following 3 characteristics:
- Creates a hostile school environment for the victim
- Infringes on the rights of the victim at school OR
- Substantially disrupts the education process or the orderly operation of a school

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Anonymous Reports By Students

- Must be investigated, while maintaining the student's name and identity confidential
- Investigation may be limited, as appropriate in view of anonymity
- Anonymous victim should be informed of this at start of investigation
- Must be investigated to the extent possible
- No discipline may be implemented based ***solely*** on an anonymous report

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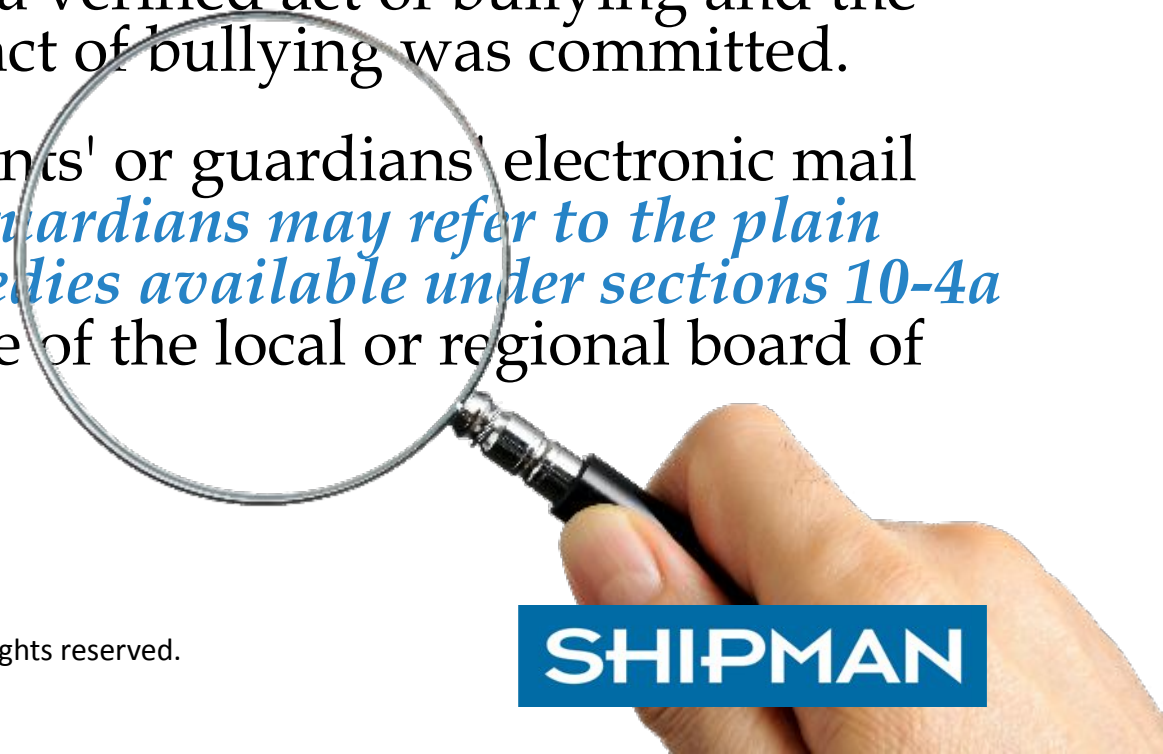
When the Investigation is Complete…

- No written report **required**. However, district must have procedures to document and maintain records of complaints and investigations.
- Must have list of verified incidents.
- Within *48 hours of the completion of the investigation,* school officials must notify parents of any student who commits a verified act of bullying and the parents of any student against whom such act of bullying was committed.
- Verbally and by electronic mail, if such parents' or guardians' electronic mail addresses are known, that such *parents or guardians may refer to the plain language explanation of the rights and remedies available under sections 10-4a and 10-4b* published on the Internet web site of the local or regional board of education



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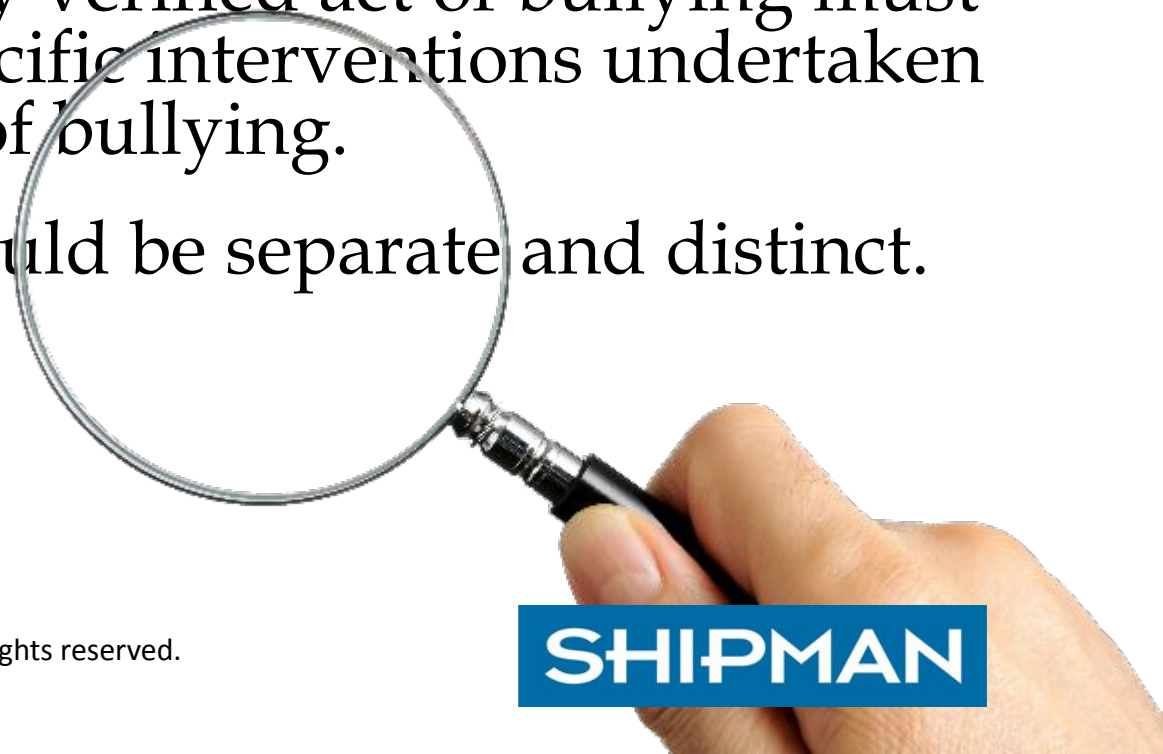
When the Investigation is Complete…

- Parents of a student whom such act was directed must be invited to a meeting where the school communicates the measures being taken by the school to ensure student safety and prevent further acts of bullying.
- Parents of a student who commits any verified act of bullying must be invited to a meeting to discuss specific interventions undertaken by the school to prevent further acts of bullying.
- Meetings with each set of parents should be separate and distinct.



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What are my responsibilities for intervention?

- When acts of bullying are verified, school officials must develop "**student safety support plans** for students against whom an act of bullying was directed that address **safety measures** the school will take to protect such students against further acts of bullying."

- When there are repeated verified acts of bullying against a single individual student or recurrently perpetrated bullying incidents by the same individual, school officials must develop **case-by-case interventions** that may include both counseling and discipline.

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What are **appropriate consequences** for bullying?

- The notification to parents of a student who committed a verified act of bullying must include "**a description of the response of school employees to such acts and any consequences that may result from the commission of further acts of bullying.**"
- Consider need for:
  - Increased supervision
  - Separation of students involved
  - Computer restrictions/loss of privileges
  - Counseling
  - Formal discipline (ISS, OSS, expulsion)

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Historically Poor School Responses

- **Mere suspension** of students involved
  - Limits student's ability to receive positive support for behavioral changes
  - Likely bullying/harassment will persist
- Schools must take **more proactive preventative approaches** to bullying and harassment
  - Not doing so may **expose districts to liability**

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Hot Topic: Bullying and FAPE

- School administrators must be aware of overlapping responsibilities regarding FAPE and bullying
  - Appropriate topic for discussion at PPT meeting?
  - Impact on FAPE for student victim?
  - Impact on FAPE for student perpetrator?
  - Are more or different supports needed?
  - Placement considerations?

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Targeted Harassment

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School Climate

Public Act 19-166

Requires school district to post on their internet website training materials for school administrators "regarding the prevention of and intervention in discrimination against and targeted harassment of students" based on such students' actual or perceived differentiating characteristics.

The discrimination or harassment may also be based on a student's "association with individuals or groups who have or are perceived to have one or more of [the] characteristics" defined on the next slide

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Differentiating Characteristics (actual or perceived) include:

Public Act 19-166

- Race
- Color
- Religion
- Ancestry
- National Origin
- Gender
- Sexual Orientation
- Gender Identity
- Gender Expression
- Socioeconomic Status
- Physical Appearance
- Mental or Physical Disability
- Developmental Disability
- Sensory Disability

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What is Targeted Harassment?

Targeted harassment includes three elements:

1. verbal or physical **act** toward a student **based on such students actual or perceived differentiating characteristics**, or association with individuals or groups with one or more of such characteristics,

2. that is **threatening, harmful, demeaning, or humiliating**, and

2. creates a **hostile environment** that **interferes with or limits a student's ability to participate** in or benefit from the services, activities, or opportunities offered by a school.

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"Targeted Harassment" Does NOT Require:

- ☒ Intent to harm
- ☒ Harm directed toward a particular student
- ☒ Repeated incidents*

* To meet the "hostile environment" standard, a single incident would have to be sufficiently severe so as to alter the student's access to education.

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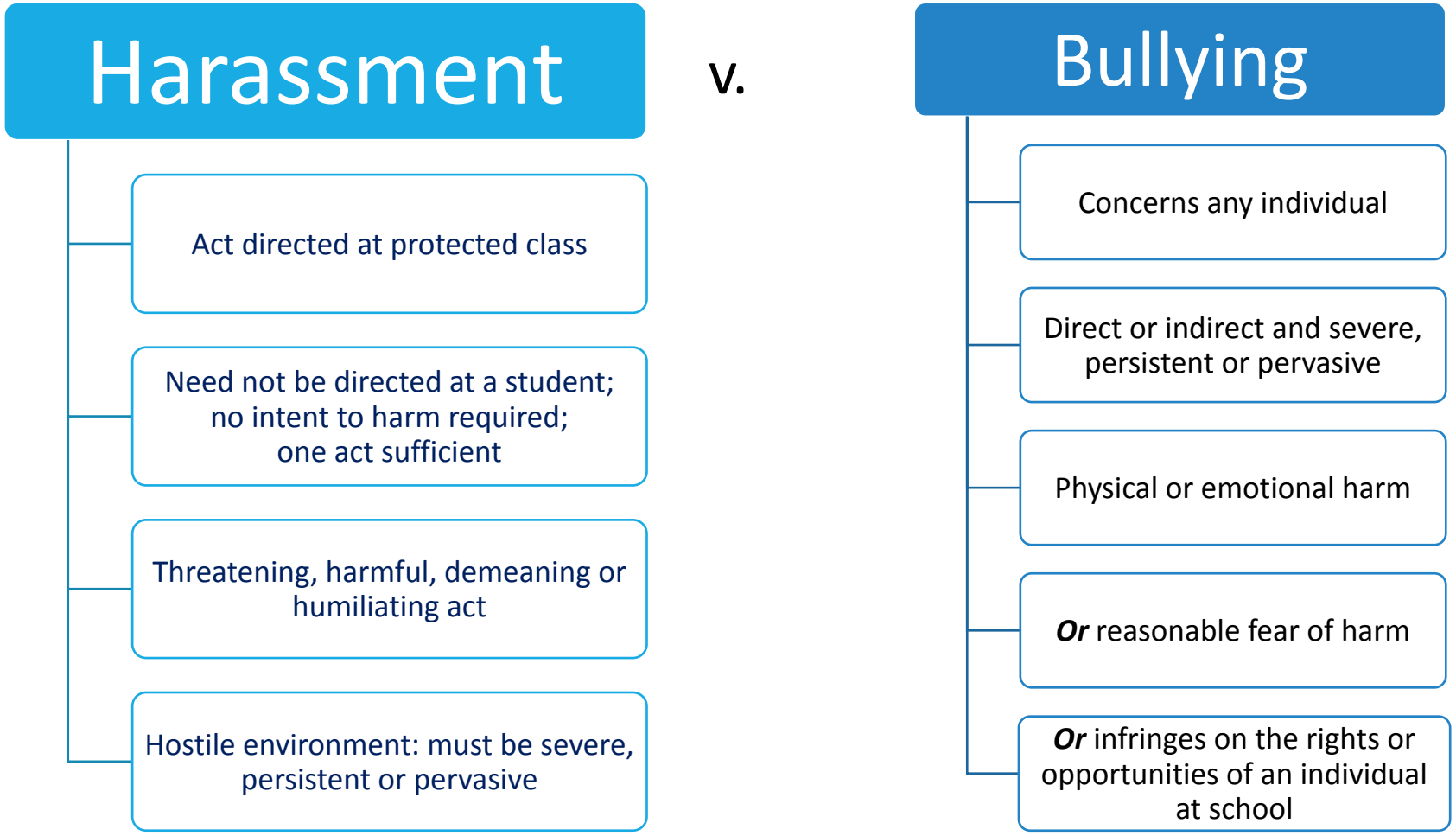
Harassment vs. Bullying


Harassment
Act directed at protected class
Need not be directed at a student; no intent to harm required; one act sufficient
Threatening, harmful, demeaning or humiliating act
Hostile environment: must be severe, persistent or pervasive
v.
Bullying
Concerns any individual
Direct or indirect and severe, persistent or pervasive
Physical or emotional harm
Or reasonable fear of harm
Or infringes on the rights or opportunities of an individual at school

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Hostile Environment

Depends on ”totality of the circumstances,” including but not limited to:

- ☑ How much of an adverse effect the conduct had on student’s education;
- ☑ The type, frequency, or duration of the conduct;
- ☑ The identity, age, and sex of the harasser(s) and the victim(s), and the relationship between them;
- ☑ The number of individuals who engaged in the harassing conduct and at whom the harassment was directed;
- ☑ The way in which the incidents occurred; and
- ☑ Whether other incidents occurred at the school involving different students

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What does harassment look like?

Name calling, including racial slurs
Severe physical act of violence
Jokes or offensive gestures
Embarrassing, threatening, humiliating, patronizing, or intimidating remarks
Graphic statements, which may include use of cell phones, internet, social media
Spreading a malicious, unfounded rumor
Mocking others' accents or mimicking the way they speak

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Responsible Employees

Employees who are responsible to take immediate and effective corrective action include any employees who:

Responsible Employees

1. Have the authority to take action to redress the harassment, or
2. Have the duty to report to appropriate school officials harassment or any other misconduct by students or employees, or
3. Any individuals who a student could reasonably believe have this authority or responsibility

OCR Dear Colleague Letter (October 2010)

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Responsible Employees

Must immediately report the misconduct so that the school may begin an investigation.

- Reach out to safe school climate specialist, and district's Title IX and Section 504/Title II coordinators, as appropriate.

Should report even just one act, as an investigation may discover additional acts that, together, may constitute a hostile environment.

Be aware of warning signs, such as behavior and attendance issues, that may signal that potential harassment is affecting a student's ability to participate in his/her educational program.

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District Liability

Peer-On-Peer Harassment

Schools may be found liable for ***failing to prevent*** peer-on-peer harassment.

Responsible employees must ***appropriately respond*** when they become ***aware***, or are provided with ***"notice."***

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Notice of Peer-on-Peer Harassment

- May include obvious signs, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on the bus, or through graffiti.
- May be less obvious, such as student misconduct, which triggers an investigation that could lead to the discovery of additional incidents.
- Prior notice of a student's past harassing conduct may trigger a school district's obligation to prevent recurrence of harassment on future victims, but only if the school has actual notice of such prior history.

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Multiple Responsibilities

- Student conduct may trigger responsibilities to investigate and respond under:
  - Bullying law/safe school climate
  - Civil rights laws for protected-class harassment (e.g. Section 504, Title IX, Title VI)
  - Student Discipline Policy (generally)
- Bullying behavior directed toward students with disabilities may trigger additional obligations related to the student's right to a free appropriate public education (FAPE):
  - Section 504, IDEA

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A Word About Title IX

- Prohibits recipients of federal funds from discriminating **on the basis of sex** (but not sexual orientation)
- Prohibits sexual harassment of students by **school employees, other students and third parties** because such conduct denies students the benefits of an educational program
- Most common cause of action among bullying/harassment cases.
  - Much peer-to-peer banter, including that constituting bullying or harassment, involves offensive words with sexual connotations

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New Final Regulations

- New Title IX regulation **holds schools accountable for failure to respond equitably** and promptly to sexual misconduct incidents.
- Final Regulations are a **significant change** to how Title IX is managed and include extensive procedural requirements.

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New Final Regulations: What's New?

A **definition** of sexual harassment

A **duty** for schools to only investigate complaints of **conduct that occurred within their program or activity**

Adoption of an **"actual knowledge" and "deliberate indifference"** standard

> Under the Final Regulations, if a school district has **actual knowledge** of sexual harassment in a district education program or activity, the district must respond **promptly** in a manner that is not **deliberately indifferent**.

A **detailed grievance process** for formal complaints of sexual harassment – **specific roles** for administrators in grievance process

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"Sexual Harassment"

"…Conduct **on the basis of sex** that satisfies one or more of the following:

- An **employee** of the District conditioning the provision of an aid, benefit, or service of the District on an individual's **participation in unwelcome sexual conduct** (i.e., *quid pro quo*);
- **Unwelcome** conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the District's education programs or activities; or
- **"Sexual assault"*** (20 U.S.C. 1092(f)(6)(A)(v)), **"dating violence"*** (34 U.S.C. 12291(a)(10)), **"domestic violence"*** (34 U.S.C. 12291(a)(8)) or **"stalking"*** (34 U.S.C. 12291(a)(30))."

*These definitions can be found in Appendix A of the Shipman & Goodwin model Administrative Regulations.

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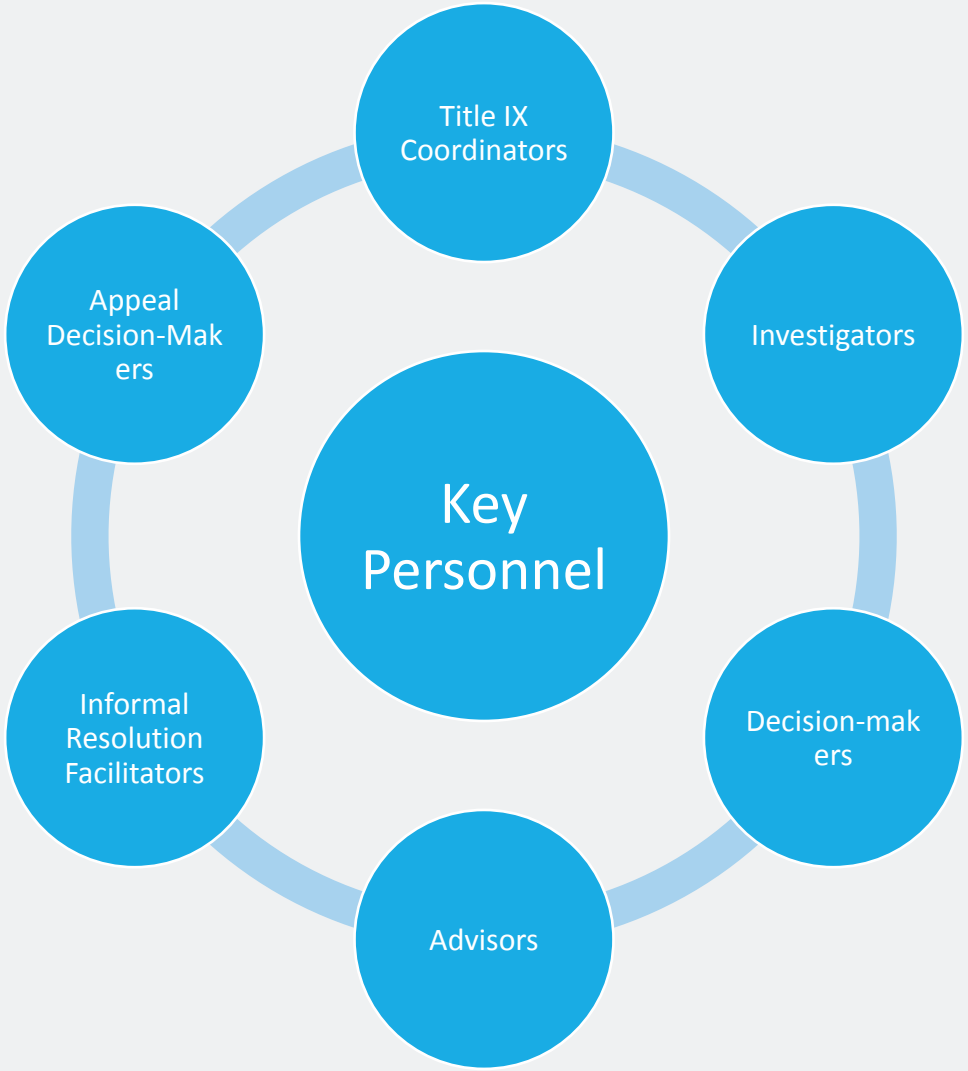
Key Personnel – Title IX



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“Actual Knowledge”

In elementary and secondary schools, the District is deemed to have **actual knowledge** when notice of sexual harassment or allegations of sexual harassment:

1. is given to the Title IX Coordinator
2. is given to any official of the District
3. is given **to any employee of an elementary or secondary school.**

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General Response to Sexual Harassment

If the District has **actual knowledge** of sexual harassment in a District education program or activity…

The District must respond **promptly** and in a manner that is not **deliberately indifferent**.

The District is **deliberately indifferent** only if its response to sexual harassment is **clearly unreasonable** in light of known circumstances.

The District's response must treat complainants and respondents **equitably** by offering supportive measures to the complainant and by following the grievance process outlined here *before* the imposition of any disciplinary sanctions or other actions that are not supportive measures.

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Types of Sexual Harassment

Quid Pro Quo
"This for That"
Unwelcome conduct so severe, pervasive and offensive that
it effectively denies a person equal access to the District's education programs or activities
Sexual assault, dating violence, domestic violence, stalking

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Quid Pro Quo

"This for That"

- When a teacher or other school employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct.
    - Submission to such conduct may either be made explicitly or implicitly.
    - If this occurs, it does not matter whether the student resists and suffers the threatened harm or submits to and avoids the threatened harm.
- Quid pro quo harassment can also occur when a District employee conditions a benefit or service on another employee's submission to unwelcome conduct.

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Severe, Pervasive, Offensive Unwelcome Conduct

When a teacher, school employee, other student, or third party engages in unwelcome conduct that is determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity.

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Sex-Based Offenses

- **"Sexual assault"** (20 U.S.C. 1092(f)(6)(A)(v)), **"dating violence"** (34 U.S.C. 12291(a)(10)), **"domestic violence"** (34 U.S.C. 12291(a)(8)) or **"stalking"** (34 U.S.C. 12291(a)(30)).

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Examples of Sexual Harassment

Unwanted sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature including:

- Statements or other conduct indicating that a student's submission to, or rejection of, sexual overtures or advances will affect the student's grades and/or other academic progress.
- Unwelcome attention and/or advances of a sexual nature, including ***verbal comments, sexual invitations, leering and physical touching***.
- ***Display of sexually suggestive objects***, or use of ***sexually suggestive or obscene*** remarks, invitations, letters, emails, text messages, notes, slurs, jokes, pictures, cartoons, epithets or gestures.
- Touching of a sexual nature or telling sexual or ***dirty jokes***.

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Examples of Sexual Harassment

Unwanted sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature including:

- Making ***sexual comments, jokes or gestures*** (written or verbal).
- ***Distributing sexually explicit images*** such as drawings or pictures, or written materials (including cyber-distribution).
- Transmitting or ***displaying emails or websites of a sexual nature***.
- Calling students ***sexually charged names***.
- Spreading ***sexual rumors***.

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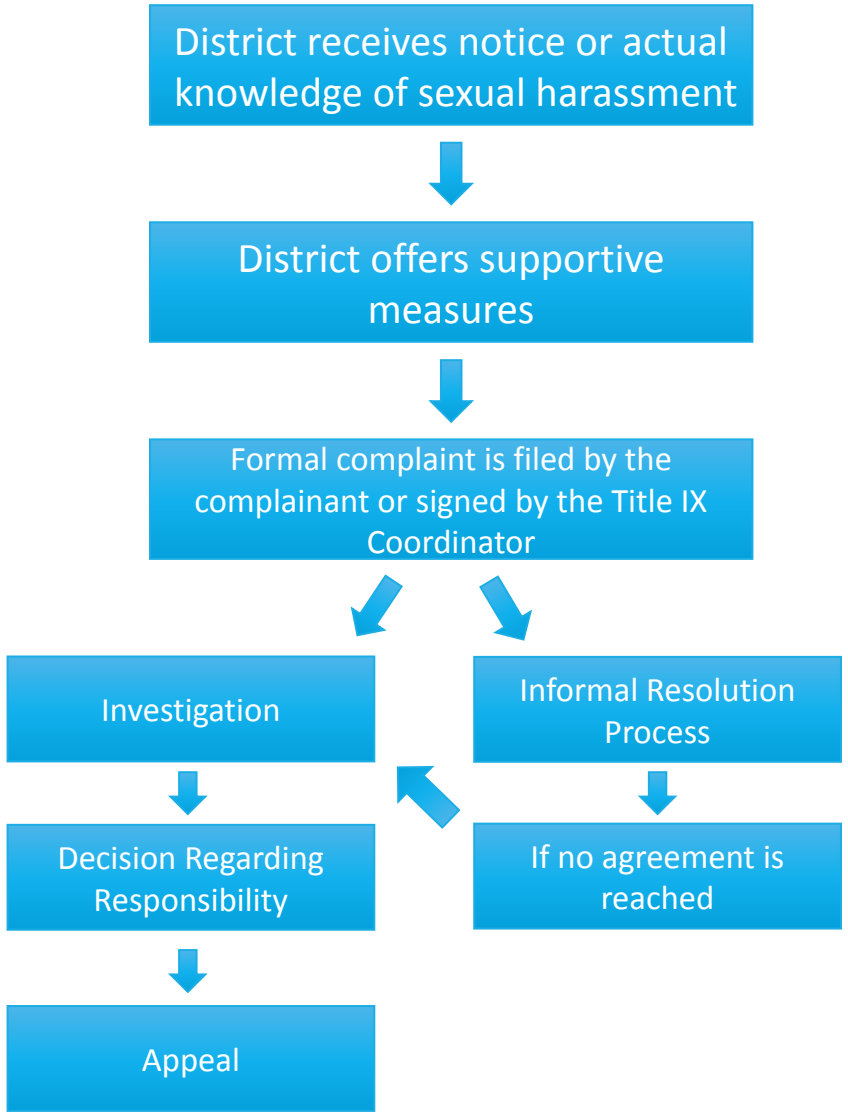
Grievance Process for Allegations of Sexual Harassment


District receives notice or actual knowledge of sexual harassment
District offers supportive measures
Formal complaint is filed by the complainant or signed by the Title IX Coordinator
Investigation
Informal Resolution Process
Decision Regarding Responsibility
If no agreement is reached
Appeal

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Principles Under the New Final Regulations

Focus on Due Process

- Treat complainant and respondent equitably
- Fairness to complainant and respondent
- Formal grievance process must be followed before discipline can be imposed

No Bias – Must be Neutral

- Between men/women
- Between complainants/respondents
- Not based on stereotypes

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Title IX Coordinator: Obligations

Title

- The District must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX. This is the "Title IX Coordinator."
- This specific title must be used to identify this individual.

Training

- Must be trained on Title IX policies and procedures.
- All training materials must be posted on the District's website.

Obligations

- Monitor the District's compliance with Title IX.
- Ensure appropriate education and training is provided.
- Coordinate the response to all reports of sex discrimination and sexual harassment.

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Title IX Coordinator:

Responsibilities within the Grievance Process

- Contact each complainant (defined as a person who is alleged to be the victim of sexual harassment) to discuss supportive measures and inform the complainant of the availability of these measures with or without filing a formal complaint
- Consider the complainant's wishes regarding supportive measures
- Explain to the complainant the process for filing a formal complaint
- Follow grievance process before imposing disciplinary sanctions if respondent is found responsible
- If respondent is found responsible, then effectively implement remedies for the complainant, designed to restore or preserve the complainant's equal educational access
- Must be impartial, unbiased, and free from conflicts

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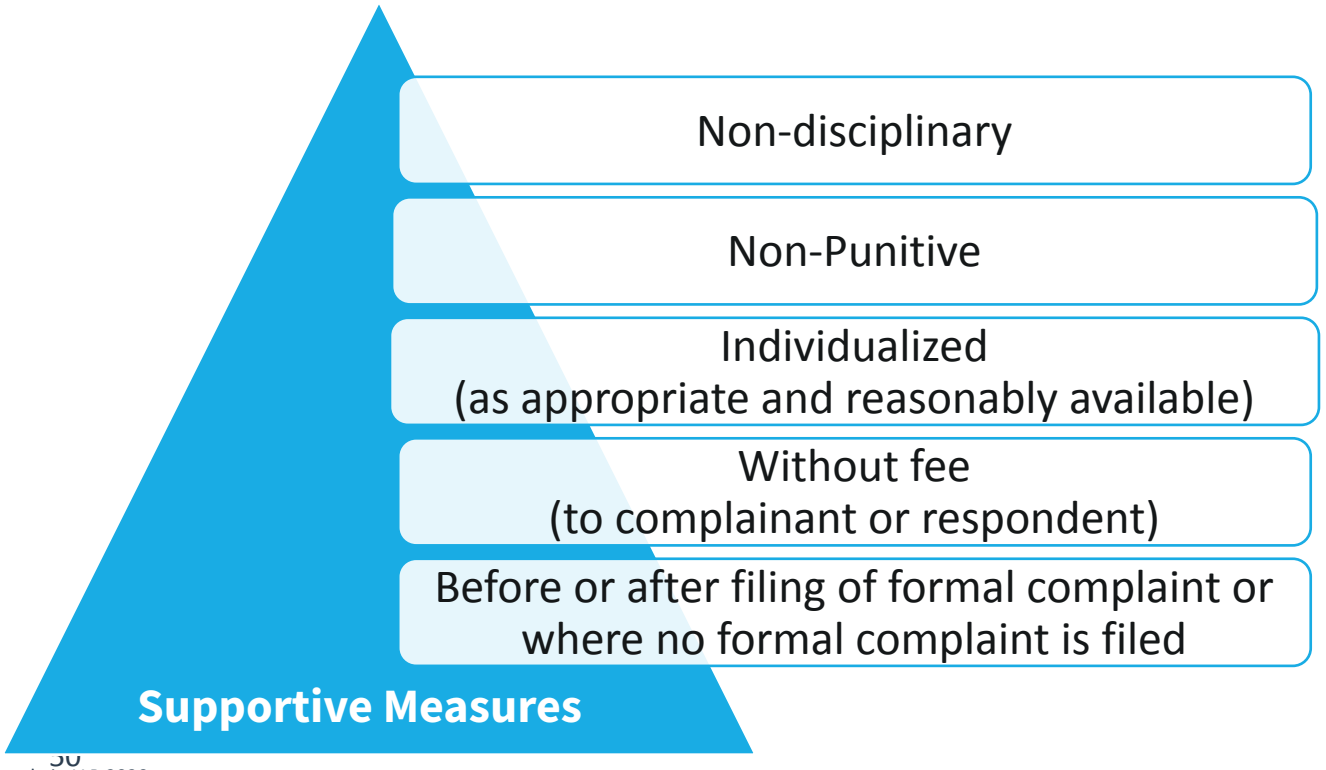
Supportive Measures

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainants wishes with respect to supportive measures, inform the complainant of the availability of supportive measures ***with*** or ***without*** filing a formal complaint, and explain to the complainant the process for filing a formal complaint.



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Formal Complaint

The filing of a formal complaint triggers the beginning of the formal grievance process.

- Title IX Coordinator will inform complainant about the right to file a formal complaint
- **But**, will ***not encourage or discourage*** a person to file a formal complaint

- At the time of filing, the complainant must be participating or attempting to participate in the District's education program or activity
- Formal complaints can be filed by a student's parent or the Title IX Coordinator.

- When the Title IX Coordinator signs a formal complaint, he/she is NOT the complainant or otherwise a party

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Grievance Process: Basic Requirements

The filing of a formal complaint is the first step in the formal sexual harassment grievance process. The process must treat complainants and respondents **equitably** by:

Providing Remedies to Complainant if/when Respondent is Found Responsible	Disciplinary Sanctions ONLY Following Grievance Process
• Remedies must be designed to restore or preserve equal access to the District's education program or activity • Remedies may include supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent	• Grievance process must be followed before any imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent • Grievance process must be **reasonably prompt** • Presumption of innocence

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Grievance Process: Basic Requirements

Evaluation of Evidence

- The grievance process requires an evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

Without Bias or Conflict of Interest

- The designated Title IX Coordinator, investigators, decision-makers, and informal resolution facilitators must not have a **conflict of interest** or **bias** against complainants or respondents generally, or an individual complainant or respondent

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“Conflict of Interest”

A conflict of interest occurs when it is proven that the Title IX Coordinator, investigator(s), and/or decision-maker(s) have personal, financial and/or familial interests that affected the outcome of the investigation.

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"Bias"

Bias occurs when it is proven that the Title IX Coordinator, investigator(s), and/or decision-maker(s) demonstrate actual bias, rather than the appearance of bias. Actual bias includes, but is not limited to, demonstrated personal animus against the respondent or the complainant and/or prejudgment of the facts at issue in the investigation.

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Notice of Allegations

Upon receipt of a formal complaint of sexual harassment, the District must provide a **written notice** to the known parties and provide the parties with a copy of the grievance process.

SAMPLE WRITTEN NOTICE FOR FORMAL COMPLAINTS OF SEXUAL HARASSMENT

[LETTERHEAD]

NOTICE OF SEXUAL HARASSMENT ALLEGATIONS

In accordance with the Board's Policy and Administrative Regulations Regarding Title IX of the Education Amendments of 1972 - Prohibition of Sex Discrimination and Sexual Harassment (Students), a formal complaint of sexual harassment has been filed with the Title IX Coordinator.

Identities of the parties involved, if known:

_____ (Complainant(s))
_____ (Respondent(s))

The conduct allegedly constituting sexual harassment: _____

_____

_____

The date and the location of the alleged incident, if known: _____

_____

The Title IX Coordinator or designee will contact the parties regarding the next step in the grievance process. Questions can be directed to the Title IX Coordinator: **[INSERT CONTACT INFORMATION FOR TITLE IX COORDINATOR]**

The respondent is presumed not responsible for the alleged conduct. A determination regarding responsibility is made at the conclusion of the grievance process.

All parties involved may have an advisor of their choice who may be, but it not required to be, an attorney. This advisor may inspect and review evidence as permitted by the Board's Administrative Regulations Regarding Title IX of the Education Amendments of 1972 - Prohibition of Sex Discrimination and Sexual Harassment (Students).

It is a violation of the Board's Student Discipline Policy to lie to school officials or otherwise engage in dishonest behavior, which includes knowingly making false statements or knowingly submitting false information during the grievance process. Any student who knowingly makes false statements or knowingly submits false information during this grievance process will be subject to sanctions pursuant to the Board's Student Discipline Policy. Any employee who knowingly makes false statements or knowingly submits false information during this grievance process is subject to discipline, up to and including termination.

A copy of the Board's Policy and Administrative Regulations Regarding Title IX of the Education Amendments of 1972 - Prohibition of Sex Discrimination and Sexual Harassment (Students) is included with this notice.

- The information to be included in the notice can be found in the Final Regulations
- Sample notice is included in the Shipman & Goodwin LLP model administrative regulations

If, in the course of an investigation, the District decides to investigate allegations about the complainant or respondent that are not included in the notice, the District must provide an **additional notice**.

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Investigation

Upon a formal complaint being filed, one or more investigators will be assigned to gather relevant evidence and draft an investigative report.

- Burden of proof and of gathering evidence sufficient to reach a responsibility determination rests on the District and not on the parties.
- The District must obtain voluntary, written consent (or consent of a parent/guardian) to obtain medical records to be used in the grievance process.

- The investigator(s) must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

- The investigator(s) may not restrict the ability of either party to discuss the allegations under investigation or to gather and present evidence.

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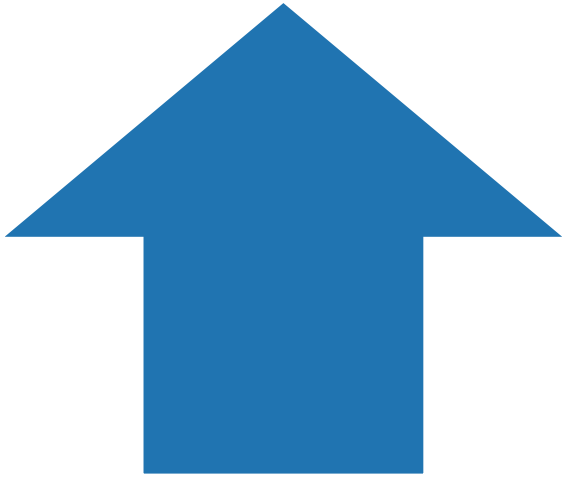
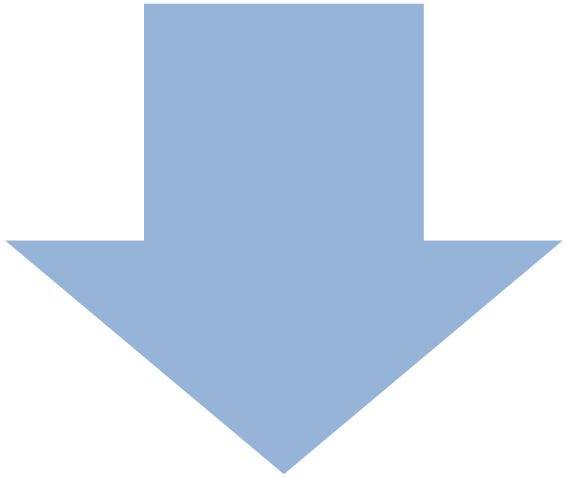
Investigation: Right to an Advisor



Both the complainant and the respondent must have the **same** opportunities to have others present during any part of the grievance process, including an opportunity to be accompanied by an **advisor** of their choice. This person can be, but is not required to be, an attorney.



The District may establish restrictions regarding the extent to which the advisor may participate in the proceedings, **as long as the restrictions apply equally to both parties**.

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Investigation

For any meeting or investigative interview, the investigator(s) must provide a **written notice** to any party whose **participation is invited or expected**. The notice must include:

- Date
- Time
- Location
- Participants
- Purpose

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Conducting a Thorough Investigation

1 nduct Investigation Interviews

- Interview of the parties
  - What happened? When did it happen? Where did it happen? Have you talked to others about what happened? Did you write down what happened?
- Witness interviews/statements
  - Do you know what is alleged to have happened? Where were you when it happened? Do you know the respondent and/or complainant? For how long and how would you describe your relationship with them (friend, acquaintance, etc.)?
- Listen carefully to answers. Ask follow up questions.
- Start with broad, general questions, then narrow the questions. Avoid yes/no questions.

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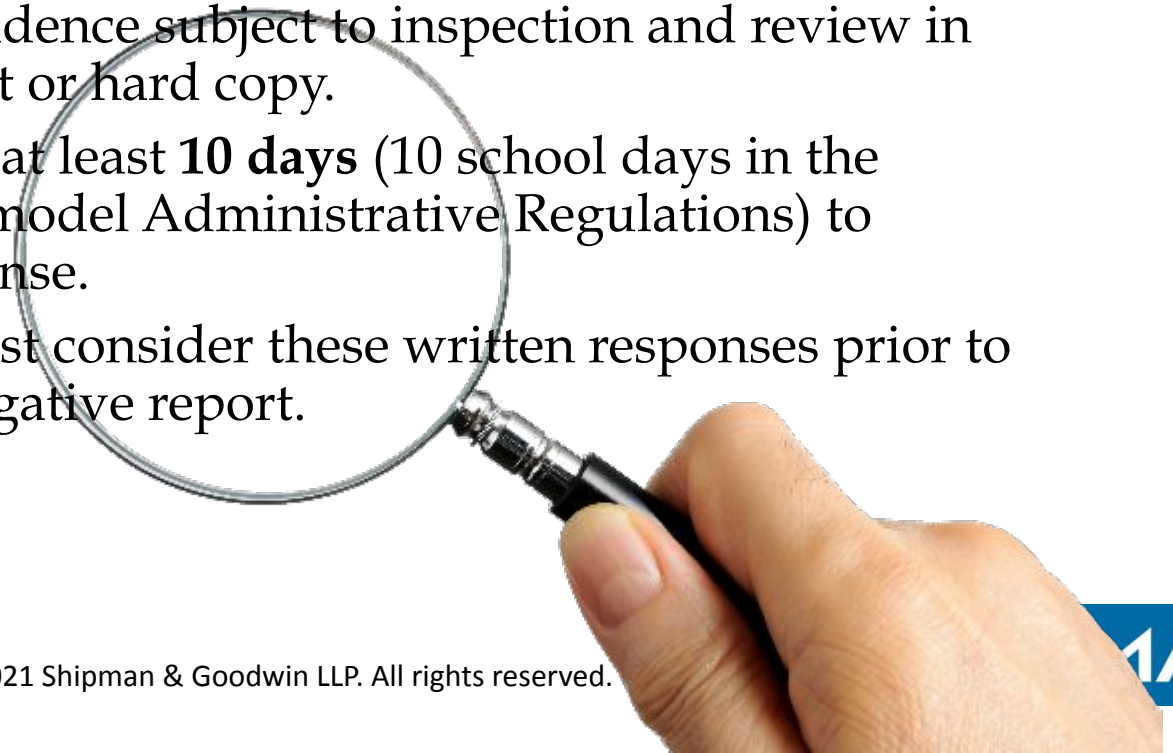
Investigation: Review of Evidence

- The investigator(s) must provide both parties an equal opportunity to inspect and review **any and all evidence** obtained as part of the investigation that is **directly related** to the allegations in the formal complaint.
- This includes any evidence upon which the investigator(s) does not intend to rely and any inculpatory or exculpatory evidence.
- The investigator(s) must send to each party (and the party's advisor, if any), the evidence subject to inspection and review in either electronic format or hard copy.
- The parties must have at least **10 days** (10 school days in the Shipman & Goodwin model Administrative Regulations) to submit a written response.
- The investigator(s) must consider these written responses prior to completing the investigative report.



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Investigation: Investigative Report

- The investigator(s) must create an investigative report that fairly summarizes the **relevant** evidence and must send the report to each party (and the party's advisor, if any) in electronic format or hard copy.
- Each party can then provide a written response to the investigative report.

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Decision-Maker

- The District shall appoint a decision-maker(s), who must be someone other than the Title IX Coordinator or the investigator(s).
- The investigator(s) and the decision-maker(s) shall not discuss the investigation's facts and/or determination while the formal complaint is pending.

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Decision-Maker – Written Questions

- After the investigative report is sent to the parties, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness.
  - The opportunity to submit written questions must be afforded to the parties even if the District provides a live hearing.
- The decision-maker(s) must then provide each party with the answers and allow for additional, limited follow-up questions from each party.
- The decision-maker(s) must explain to the party proposing the question any decision to exclude a question as not relevant.

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What is Relevant Evidence

Investigators preparing an investigative report and decision-makers allowing questions must determine if the evidence is **relevant**.

- Evidence is relevant if it has a tendency to make something more or less probable than it would be without the evidence and it is of consequence in determining the question of sexual harassment.
  - Relevance is broad and can include questions about the who, what, when, and how of the allegations, as well as issues related to motive or bias, among others.
  - Relevant evidence includes both exculpatory and inculpatory evidence (i.e. must look at evidence that is both favorable and unfavorable to any party).
- Evidence that constitutes or seeks disclosure of information protected under a legally recognized privilege (i.e. attorney-client or doctor-patient) cannot be required, allowed, or relied upon unless the person holding the privilege has waived the privilege.

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Rape Shield

Investigators and decision-makers are not allowed to ask questions or seek evidence about a complainant's prior sexual acts because such acts are deemed irrelevant. The parties may not ask these questions of each other.

Unless … the evidence is used to prove:

- someone other than the respondent committed the alleged offense, or
- specific incidents of past sexual behavior between the complainant and respondent and is offered to prove consent.

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Decision-Maker: Responsibility Determination

Decision-makers must weigh the relevant evidence and decide whether it meets the standard of evidence to demonstrate that sexual harassment occurred.

- Preponderance of the evidence standard = more likely than not responsible.
- Clear and convincing evidence = highly probable to be true

The decision must be based on an objective evaluation of the evidence, and the decision-maker must be able to explain his/her rationale based on the evidence.

Decision-makers need to use independent judgment and be free from conflict of interest and bias.

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Decision-Maker: Responsibility Determination

The decision-maker(s) will issue a written determination regarding responsibility. The written determination will include:

1. Identification of the allegations potentially constituting sexual harassment;
2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held (if applicable);
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the District's code of conduct (student discipline policy) to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the District will impose on the respondent, and whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the complainant; and
6. The District's procedures and permissible bases for the complainant and respondent to appeal.

The written determination will be provided to **both** parties **simultaneously.**

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Appeals

Either party can appeal from a responsibility determination or a dismissal of a formal complaint on the following bases:

New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;

Procedural irregularity that affected the outcome of the matter; or

The Title IX Coordinator, investigator(s), and/or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

The District may add other bases for appeal so long as they are offered equally to both parties.

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Appeals

When an appeal is filed, the District:

- Provide notice to the other party in writing and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the investigator(s), Title IX Coordinator, or decision-maker(s) for the responsibility determination;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

Supportive measures for either or both parties be continued throughout the appeal process.

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How To Serve Impartially

- Everyone designated as an investigator, decision-maker, appeal decision-maker, informal resolution facilitator, or Title IX Coordinator must serve impartially and must avoid prejudgment of the facts at issue, conflicts of interest, and bias.
- Investigators and decision-makers cannot evaluate or collect evidence in a way that is based on stereotypes or that favors complainants over respondent or men over women

NOTE: Different treatment of complainants and respondents due to sex-based stereotypes about how men and women behave with respect to sexual violence violates Title IX.

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Responding to Potential Harassment Claims

Recognize

that student-on-student conduct may constitute racial, sexual or disability harassment (or other protected-class harassment), and may implicate anti-harassment policies

Remember

that misconduct need not be directed at a particular student to constitute discriminatory harassment fostering hostile environment

Involve

relevant District personnel (Title IX, Title VI, or Section 504 Coordinator)

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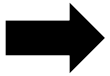
Harassment Directed Toward Students with Disabilities

May trigger additional obligations related to the student's right to a free appropriate public education (FAPE)

- Section 504
- PPT process



Notify the student's case manager and/or the district's Section 504 coordinator

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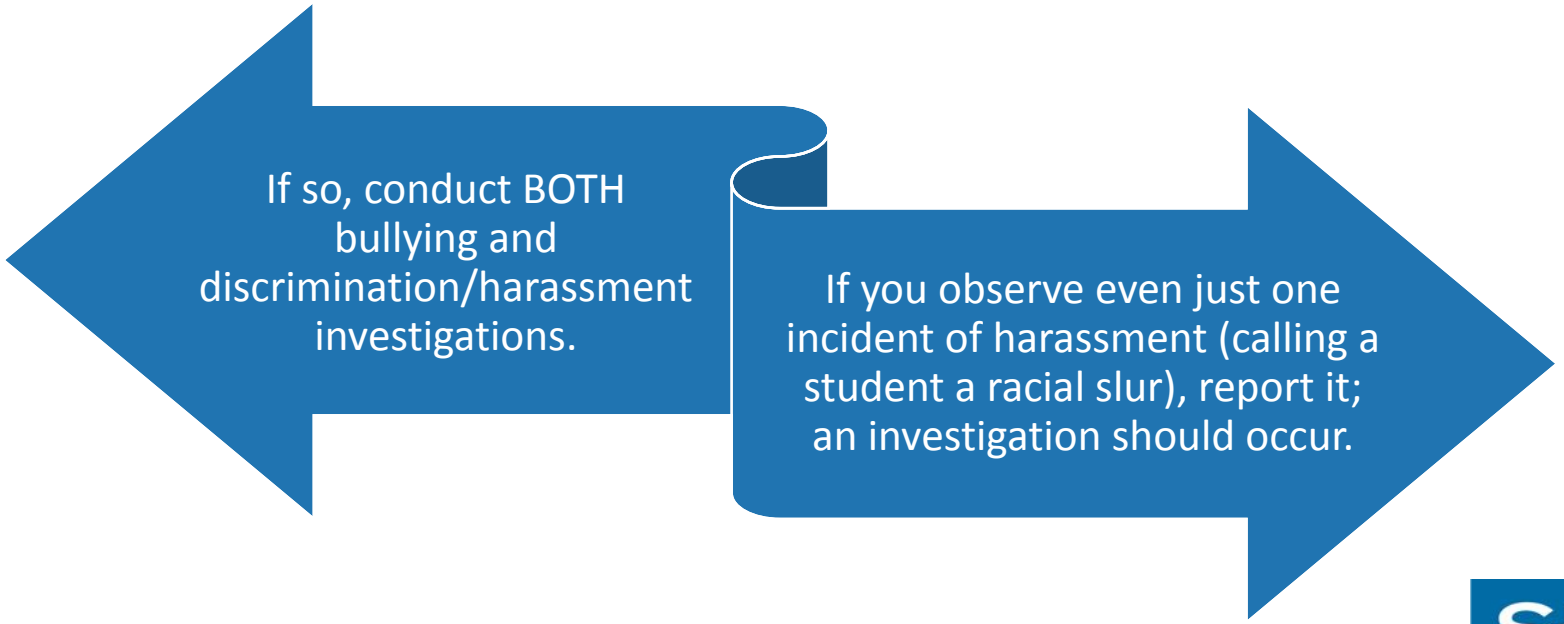
Practical Suggestions

When reviewing "bullying" complaints always ask whether the conduct at issue may be based on a protected class. Is the alleged bullying based on:

- Race, national origin or color?
- Sex?
- Disability?
- Other protected classes under state law? (e.g. gender identity or expression, sexual orientation?)


If so, conduct BOTH bullying and discrimination/harassment investigations.
If you observe even just one incident of harassment (calling a student a racial slur), report it; an investigation should occur.

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Investigations

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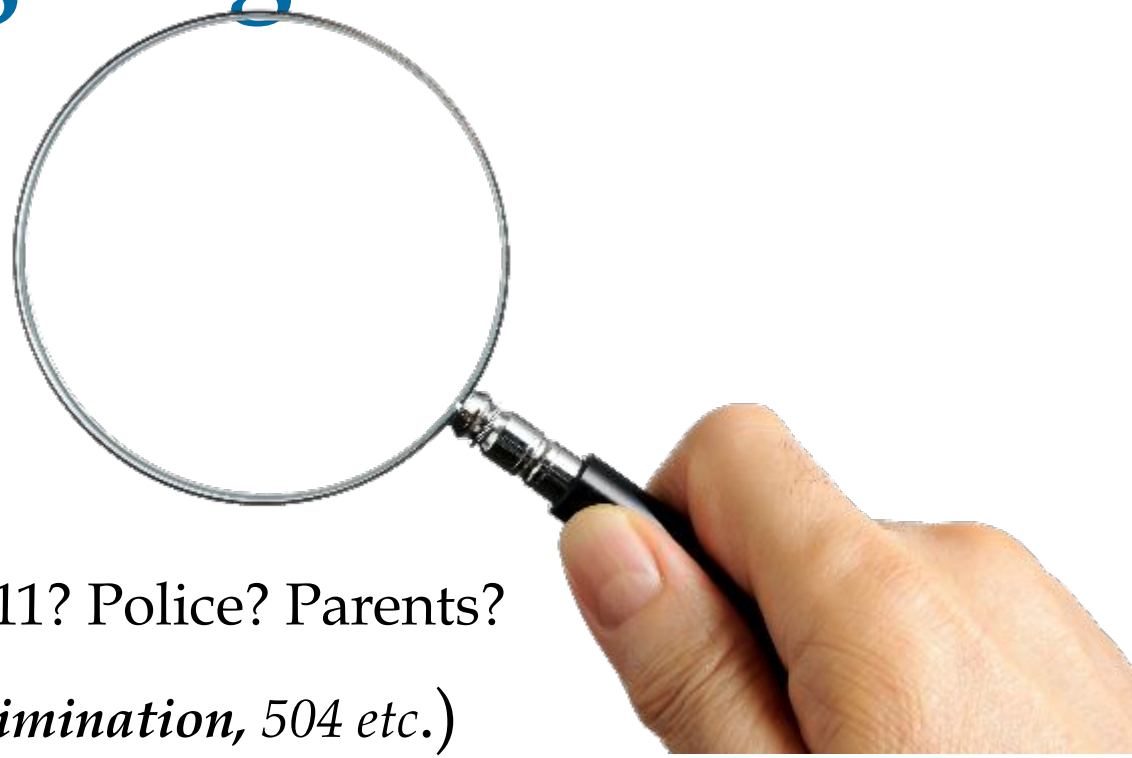
Before You Start Investigating

- *Understand the allegations/complaint*
  - What is the question(s) I need to answer?
  - Is how the student characterized it accurate?
- *Prioritize*
  - Any immediate safety issues? Need to call 211? Police? Parents?
- *Identify relevant policies* (***Title IX, Non-discrimination,*** *504 etc.*)
  - Contact relevant coordinators
- Does student have *IEP/504 Plan?*



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Elements of Fair Discipline Process

- Prompt, thorough, fair
- Objective
- Opportunity to be heard
- Don't prejudge; don't rush to judgment
- Compile as much "proof" as reasonably possible
- Document (and date)
- Save evidence
- Be a critical thinker – does the information support the conclusion/meet the standards you need to prove
- Be patient

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How Should the Complaint Be Investigated?

Be mindful of:

- Promptness
- Neutral Fact Finding
- Identify and Gather Relevant Evidence
- FERPA and Confidentiality Considerations

Document the investigation thoroughly!

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Check Yourself

- Do I have a clear understanding of allegation?
- Am I going in with a preconceived idea as to what happened? Why?
- Do I have any idea "why" this happened?
- Has this happened before? Prior history?
- Who might have relevant information I need to talk to?

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Relevant Questions: Bullying/Harassment

- Was the student's conduct harassment?
  - Was it due to the victim's race, national origin, religion or disability? If so, conduct **BOTH** bullying and discrimination/harassment investigations (applying all relevant policies).
  - Was it sexual harassment – Title IX procedures needed
- What has been the impact? Does the conduct seem to deny or limit the student's ability to participate in or benefit from the educational program?
  - In other words, has the school environment become a hostile environment?

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What Does An Investigation Look Like?

- Who do you talk to (first)?
- What if the student is not in school?
- What evidence do you collect? How?
- Should I collect statements?
- Can a parent prevent you from talking to the student?
- What should be documented?

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Investigating Cyberbullying

- Were school electronic devices used?
  - On or off campus?
- What is the impact on the victim in school?
- Does the cyberbullying do any of the following:
  - Create a hostile environment for the student at school?
  - Infringe on the rights of the victim at school?
  - Substantially disrupt the educational process or orderly operation of the school?

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Electronic Communications: Side Note

- ☑ Electronic communications are the "Means" **not the "Conduct"**
- ☑ Address behaviors for their Content, **not their Form**
- ☑ Electronic Communications Give:
  - Better Documentation
  - More Widespread Distribution
  - Adverse Effects are Greater

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How to Write a Summary/Report

If a report is needed:

- Include findings of fact
- Include a determination of whether acts of bullying/harassment were verified
- Include recommendation for intervention, which may include disciplinary action
- If NOT found to be bullying/harassment, still appropriate to set forth supports/interventions as needed.
- Avoid making legal conclusions

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Common Pitfalls in Investigations

- Failing to be prompt
- Missing class-based harassment red flags
- Failing to follow appropriate complaint procedures
- Not communicating with parents/sharing findings of the investigation
- Prejudging/incomplete investigation

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Remedial Actions

Vary widely as bullying/harassment takes many forms, but at minimum, MUST:

- Other possible remedial actions:
  - Implementation of positive behavioral interventions and supports process
  - Discipline
  - School-wide seminars/presentations
  - Counseling
  - Adequate adult supervision of outdoor areas, hallways, the lunchroom
  - Inclusion of grade appropriate bullying education and prevention curricula

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Interventions for Victims of Harassment/Bullying

- Intervention strategies for a harassed student may include:

- Counseling
- Increased supervision and monitoring to observe and intervene as appropriate
- Encouragement of student to seek help when victimized or witnessing victimization
- Peer mediation, where appropriate
- Student safety support plan

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Decision Making

In making a decision about discipline, consider:

- Do I have all the facts?
- Is a manifestation determination needed?
- Is there need for referral?
- Is a risk assessment needed?
- How do facts match up to policies and rules?

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Decision Making

In making a decision about discipline, consider:

- Age, grade, developmental stage
- Severity of misconduct (frequency, intensity)
- Discipline history
- Pattern and intent
- Culture and communication factors

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Decision Making

In making a decision about discipline, consider:

- Standard for removal, ISS, OOS, Expulsion
- Legal restrictions on OOS Suspensions
- District responses in other similar cases
- Is response discretionary or mandatory?
- Are alternatives available that might be effective?

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Questions?

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